Pilba Trading & Agency v South East Asia Insurance Bhd & Anor

HIGH COURT (KUCHING) — CIVIL APPEAL NO 11-02-97-II
MUHAMMAD KAMIL J
19 AUGUST 1997

Tort *— Negligence — Insurer — Duty to insured — Insured sent damaged car for repair at workshop appointed by insurer — Long delay at workshop — Insured incurred expenses in hiring alternative vehicle — Whether delay due to insurer's negligence — Whether insurer owed duty of care*

Tort *— Negligence — Economic loss — Long delay at workshop — Expenses incurred in hiring alternative vehicle — No physical damage — Pure economic loss — Whether recoverable*

The appellant took its damaged car for repair at a workshop appointed by the respondents. At the material time, the car was covered by insurance policy issued by the first respondent. The repairs took about 59 days and the appellant was deprived of the use of the car for that duration. It was alleged that the long delay was caused by the negligence of the respondents. Thus, the appellant brought an action against the respondents claiming special damages, ie the amount incurred by the appellant in hiring alternative transport while the car was in the workshop. The sessions court dismissed the appellant's claim and hence this appeal. The appellant argued that under the principles of *Donoghue v Stevenson* [1932] AC 562, the respondents owed a duty of care to the appellant and they were responsible for the economic loss that the appellant had suffered. The respondents denied that they owed a duty of care and they contended that the principles of *Donoghue v Stevenson* had no application in the case as there was no physical damage suffered and that the principles did not apply to a pure economic loss. Moreover, the respondents argued that the relationship between the appellant and the first respondent was by way of an insurance policy. It was further argued that the obligations or duties of the insurer were contractual, ie to indemnify the insured against loss or damage to the appellant's vehicle, and should exclude further tortious claim. The appellant had not shown or adduced evidence to show that their duties extend beyond the insurance policy. The appellant argued that the concept of *Donoghue v Stevenson* should be extended as a matter of public policy in order to do justice, and that insurance companies should not get away with impunity on the ground of contractual promises.

Held, dismissing the appeal:

(1) To institute the right of action for negligence, three elements must be proved, ie: (a) there is a duty on the part of the defendant towards the plaintiff; (b) the defendant negligently performs or omits to perform its duty; and (c) the negligence is the effective

cause of injury or damage to the plaintiff. The onus of proving that the result of negligence is the effective cause of injury is upon the plaintiff. The defendant is responsible for the consequences which he could foresee or reasonably be expected to foresee as the natural result of his negligent act or omission.

In the present case, it was clear that the appellant was unable or failed to prove that the respondents had a duty toward the appellant in this matter. It had also failed to prove that the respondents had neglected or omitted to carry out their duties. The appellant had further failed to adduce evidence to prove damage suffered by it as a result of the negligent act or omission of the respondents.

Moreover, in the instant case, the alleged loss was pure economic loss. It was a financial or pecuniary loss and did not involve any physical damage or danger of physical damage to the property of the appellant. It was quite distinct from cases of economic loss involving physical damage. The established legal position in regard to this is to preclude such claims even where foreseeable. The courts have always been reluctant to extend the law of negligence to claims of foreseeable economic loss (see pp 61B–D, 62E–H and 63G–H).

(2) There must be a limitation on the extent to which a court will enforce contractual promises. Despite the freedom of contract, there is still a residuary power to strike down contract as contrary to public policy. Nevertheless, the court would not venture to open 'the heads' of public policy, as in this case, which seemed to be a frolic outside the domain of this court.

On the totality of evidence and in the circumstances of the case, the appellant had failed to prove its case, and the appeal was dismissed with costs (see pp 61H–I, 62B–C and 64D).

Obiter:

It was not correct to bring a claim against the second respondent as he was not a party to the cause of action. As the action was grounded on negligence, the second respondent could not be said as a tortfeasor in the action. He was a branch manager of the first respondent, and there was no evidence to show that he gave the approval or authorization to repair the car on behalf of the first respondent, and therefore that his action or omission caused the delay in the repair of the vehicle. He could not be vicariously liable. Moreover, the action was against the company — the first respondent — and the appellant was alleging that the company committed a tort of negligence against it. The company could be sued only in its own name, and not through its employee, bearing in mind that he was not a tortfeasor, as the company is a separate legal entity from its employees (see p 64A–C).

A [**Bahasa Malaysia summary**

Perayu telah menghantar keretanya yang rosak untuk dibaiki di sebuah bengkel yang dilantik oleh penentang-penentang. Pada masa yang material, kereta tersebut dilindungi oleh polisi insurans yang dikeluarkan oleh penentang pertama. Kerja-kerja pembaikan B mengambil kira-kira 59 hari dan perayu tidak dapat menggunakan kereta tersebut selama tempoh itu. Ia dikatakan bahawa kelewatan yang berlarutan disebabkan oleh kecuaian penentang-penentang. Justeru itu, perayu membawa satu tindakan terhadap penentang-penentang menuntut ganti rugi khas, iaitu amaun yang ditanggung oleh perayu dalam menyewa pengangkutan alternatif sementara kereta C tersebut ditinggalkan di bengkel. Mahkamah sesyen menolak tuntutan perayu dan maka rayuan dibuat. Perayu menghujahkan bahawa di bawah prinsip *Donoghue v Stevenson* [1932] AC 562, penentang-penentang mempunyai kewajipan berjaga-jaga terhadap perayu dan mereka bertanggungjawab atas kerugian ekonomi yang dialami oleh D perayu. Penentang-penentang menafikan bahawa mereka mempunyai kewajipan berjaga-jaga dan menghujahkan bahawa prinsip-prinsip *Donoghue v Stevenson* tidak terpakai dalam kes kerana tiada kerosakan fizikal telah dialami dan bahawa prinsip-prinsip itu tidak terpakai kepada kerugian ekonomi semata-mata. Tambahan pula, penentang-penentang berhujah bahawa perhubungan di antara perayu dan E penentang pertama adalah melalui suatu polisi insurans. Ia seterusnya dihujahkan bahawa obligasi atau kewajipan penanggung insurans adalah kontraktual, iaitu untuk menanggung rugi pengambil insurans terhadap kerugian atau kerosakan kepada kenderaan perayu, dan patut mengecualikan tuntutan tort yang lanjut. Perayu tidak F menunjukkan atau mengemukakan keterangan bagi menunjukkan bahawa kewajipan mereka berlanjutan melampaui polisi insurans. Perayu menghujahkan bahawa konsep *Donoghue v Stevenson* harus dilanjutkan sebagai satu perkara polisi awam demi mencapai keadilan, dan bahawa syarikat insurans tidak patut bebas daripada hukuman atas alasan janji kontraktual.

G

Diputuskan, menolak rayuan:

(1) Bagi memulakan hak tindakan untuk kecuaian, tiga unsur patut dibuktikan, iaitu: (a) terdapat kewajipan pada pihak defendan terhadap plaintif; (b) defendan telah menjalankan tugas secara H cuai atau tidak menjalankan kewajipannya; dan (c) kecuaian adalah sebab berkesan kecederaan atau kerosakan kepada plaintif. Beban membuktikan bahawa akibat kecuaian adalah sebab kecederaan berkesan terletak pada plaintif. Defendan bertanggungjawab atas akibat yang boleh dijangkanya atau dapat dijangka secara munasabah sebagai akibat biasa perbuatan cuai I atau peninggalannya.

Dalam kes ini, adalah nyata bahawa perayu tidak dapat atau gagal membuktikan bahawa penentang-penentang mempunyai

kewajipan terhadap perayu dalam perkara ini. Ia juga telah gagal membuktikan bahawa penentang-penentang telah cuai atau gagal untuk menjalankan kewajipan mereka. Perayu selanjutnya telah gagal mengemukakan keterangan untuk membuktikan kerosakan yang dialaminya akibat perbuatan cuai atau peninggalan penentang-penentang.

Tambahan pula, dalam kes ini, kerugian yang dikatakan adalah kerugian ekonomi semata-mata. Ia merupakan kerugian kewangan dan tidak melibatkan apa-apa kerosakan fizikal atau risiko kerosakan fizikal kepada harta perayu. Ia berbeza sekali dengan kes-kes kerugian ekonomi yang membabitkan kerosakan fizikal. Kedudukan undang-undang yang mantap berhubung ini adalah untuk mengecualikan tuntutan demikian biarpun di mana boleh dijangka. Mahkamah selalunya enggan melanjutkan undang-undang kecuaian kepada tuntutan kerugian ekonomi yang boleh dijangka (lihat ms 61B–D, 62E–H dan 63G–H).

(2) Mesti adanya had masa atas takat mana mahkamah boleh menguatkuasakan janji kontraktual. Meskipun terdapat kebebasan kontrak, masih ada kuasa baki untuk membatalkan kontrak yang bertentangan dengan polisi awam. Namun demikian, mahkamah tidak akan membuka 'kepala' polisi awam, seperti dalam kes ini, yang nampaknya sesuatu yang di luar domain mahkamah ini.

Pada keseluruhan keterangan dan dalam keadaan kes, perayu gagal membuktikan kesnya, dan rayuan ditolak dengan kos (lihat ms 61H–I, 62B–C dan 64D).

Obiter:

Adalah tidak betul untuk membawa satu tuntutan terhadap penentang kedua kerana dia bukan suatu pihak kepada kausa tindakan. Oleh kerana tindakan adalah berdasarkan kecuaian, penentang kedua tidak boleh dikatakan sebagai pelaku tort dalam tindakan. Dia adalah pengurus cawangan penentang pertama, dan tiada keterangan untuk menunjukkan bahawa beliau telah memberi kelulusan atau kuasa untuk membaiki kereta tersebut bagi pihak penentang pertama, dan maka tindakan atau peninggalannya menyebabkan kelewatan dalam pembaikan kenderaan. Beliau tidak mungkin bertanggungjawab secara vikarius. Tambahan pula, tindakan adalah terhadap syarikat — penentang pertama — dan perayu mengatakan bahawa syarikat telah melakukan tort kecuaian terhadapnya. Syarikat hanya boleh didakwa dalam nama sendiri, dan bukan melalui pekerjanya, dengan mengingati bahawa dia bukan pelaku tort, kerana syarikat adalah entiti undang-undang yang berasingan daripada pekerja-pekerjanya (lihat ms 64A–C).]

Notes

For cases on negligence, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 315–852.

Cases referred to

Anns v Merton London Borough Council [1978] AC 728 (refd)
Caparo Industries plc v Dickman & Ors [1990] 1 All ER 568 (refd)
D & F Estates Ltd & Ors v Church Commissioners for England & Ors [1989] AC 177 (refd)
Donoghue v Stevenson [1932] AC 562 (refd)
Enderby Town Football Club Ltd v Football Association Ltd [1971] Ch 591 (refd)
Fender v St John-Mildmay [1938] AC 1 (refd)
Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundations Ltd & Ors [1989] 1 QB 95 (refd)
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575 (refd)
Hussaina Rani i/k Naina Mohamed (suing as widow of Naina Mohamed, deceased) v Ahmad Nadzri Kamarudin & Anor [1997] 2 MLJ 534 (refd)
Junior Books Ltd v Veitchi Co Ltd [1983] 1 AC 520 (refd)
Leigh & Sillavan Ltd v Aliakman Shipping Co Ltd [1986] 1 AC 785
McLoughlin v O'Brian [1983] 1 AC 410 (refd)
Muirhead v Industrial Tank Specialities Ltd [1986] QB 507 (refd)
Murphy v Brentwood District Council [1990] 2 All ER 908 (refd)
Ogwo v Taylor [1987] 3 WLR 1145 (refd)
Richardson v Mellish (1824) 2 Bing 229 (refd)
Ruoff v Long & Co [1916] 1 KB 148 (refd)
Salomon v Salomon & Co Ltd [1897] AC 22 (refd)
Sutherland Shire Council v Heyman (1985) 60 ALR 1 (refd)
Wagon Mound, The [1961] AC 388 (refd)
Wagon Mound (No 2), The [1967] 1 AC 617 (refd)
Yuen Kun Yeu & Ors v Attorney General of Hong Kong [1987] 3 WLR 776 (refd)

RJ Noel (*RJ Noel Advocates*) for the appellant.
Roland Thomas (*Battenberg & Talma*) for the respondents.

Muhammad Kamil J: The appellant took its damaged motor car ('the vehicle') on 12 March 1993 for repair at Tan Chong Express (a corporate workshop) appointed by the respondents. At the material time, the vehicle was covered by Policy Insurance No 002129667/0101 dated 11 December 1992, issued at Kuching, by the first respondent. There was no dispute about this.

The repairs were carried out by the corporate workshop to the satisfaction of the appellant. There was no dispute about this. However, the repairs took about 59 days from the time the vehicle was sent to the workshop. There is no doubt the appellant was deprived of the use of the vehicle for the duration the vehicle was in the workshop, and it used the services of a taxi to get about its work. It alleged that the long delay was caused by the negligence of the respondents or their agent and thus brought a claim against the respondents for special damages, ie the amount

of RM4,327.65 which was incurred by the appellant in taxi fares and telephone calls. The appellant's claim was dismissed with costs by the sessions court and hence this appeal. A

The main thrust of the appellant's contention in the appeal is that under the principles of *Donoghue v Stevenson* [1932] AC 562, the respondents owed a duty of care to the appellant and they were responsible for the economic loss that the appellant had suffered. The respondents denied that they owed a duty of care and that they were responsible; and they contended that the principles of *Donoghue v Stevenson* have no application in the case as there is no physical damage suffered; the principles do not apply to a pure economic loss. In support, the respondents cited the following authorities: *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520; *Muirhead v Industrial Tank Specialities Ltd* [1986] QB 507 (CA); *D & F Estates Ltd & Ors v Church Commissioners for England & Ors* [1989] AC 177 (HL); *Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundations Ltd & Ors* [1989] 1 QB 71 and *Caparo Industries Plc v Dickman & Ors* [1990] 1 All ER 568 (HL). B C D

The facts of *Donoghue v Stevenson* are well known. Mrs Donoghue suffered damage as a result of drinking part of a bottle of ginger-beer in which a decomposing snail was found. She had drunk the ginger-beer in a cafe but she was not the purchaser. She began an action against the manufacturer of the ginger-beer, Stevenson. The case reached the House of Lords on a preliminary issue of whether any duty was owed by the manufacturer, Stevenson, to the consumer of his products. Lord Atkin, who gave the leading judgment, made two statements which are potential rationes decidendi (at pp 580, 599): E

(a) A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination ... owes a duty to the consumer to take reasonable care; and F

(b) The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably forsee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. G H

Principle (a) is known as the narrow ratio and subsequent cases have applied and extended it in a variety of ways. 'Manufacturer' has been extended to retailers, repairers of goods and suppliers of drinking water. 'Products' has been held to include not just food and drinks but cars, houses, hair dye and underwear. The 'ultimate consumer' has been extended to cover a bystander injured by a defective product. I

Principle (b), the neighbour principles, has been directly applied in cases too numerous to mention. In *Ogwo v Taylor* [1987] 3 WLR 1145, the facts were as follows. A man, who was using a blow lamp to strip paint, negligently set fire to his house. A fireman attending the blaze was seriously injured. The House of Lords held that the fireman was a person so closely or directly affected by the defendant's action that he ought reasonably to have him in contemplation.

In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; [1963] 2 All ER 575 (HL), the House of Lords was of the opinion that the principles stated in *Donoghue v Stevenson* was too wide. Another pre-requirement before a duty of care could be established as existing and flowing from the tortfeasor to the plaintiff is that there should be a relation of proximity between the plaintiff and the defendant. The meaning of proximity was extended from mere physical nearness to other circumstances including where the plaintiff had depended on the defendant to carry out a task and when the defendant could have reasonably expected to know of this dependence.

The creation of new duty situations the neighbour principle itself was reformulated in two-stage test in *Anns v Merton London Borough Council* [1978] AC 728. One has to ask whether:

(i) As between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may likely cause damage to the latter in which case a prima facie duty of care arises; and

(ii) if the first question is in the affirmative, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damage to which a breach of it may give rise (per Lord Wilberforce).

This version of the principle led to 'policy-based' decisions to extend it to wholly new forms of loss or damage. For example, there were areas of liability for nervous shock (*McLoughlin v O'Brian* [1983] 1 AC 410) and economic loss (*Junior Books Ltd v Veitchi Co Ltd* [1983] AC 520).

By mid-1980s, the House of Lords began to turn against the *Anns*'s principle. In *Leigh & Sillavan Ltd v Aliakman Shipping Co Ltd* [1986] 1 AC 785, Lord Brandon of Oakbrook said (at p 815):

> ... that passage [in *Anns*] does not provide, and cannot in my view have been intended by Lord Wilberforce to provide, a universally applicable test of the existence and scope of a duty of care in the law of negligence.

In *Yuen Kun Yeu & Ors v Attorney-General of Hong Kong* [1987] 3 WLR 776, a Privy Council case, Lord Keith of Kinkel significantly restated the narrow ratio of *Donoghue v Stevenson* and attacked the *Anns*'s test. He denied that foreseeability of harm is the only criterion for a creation of a sufficient relationship proximity or neighbourhood (at p 783):

> ... Otherwise there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air and forbears to shout a warning.

Lord Keith's conclusion was this (at p 785):

> In view of the direction in which the law has since been developing their Lordships consider that for the future it should be recognized that the two-stage test in *Anns v Merton London Borough Council* [1978] AC 728 at pp 751–752 is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care.

Lord Brandon succinctly states the current position in *Junior Books v Veitchi* that:

> ... in *Donoghue v Stevenson* itself and in all numerous cases in which the principles of that decisions has been applied to different but analogous factual situations, it has always been either stated expressly, or taken for granted, that an essential ingredient in the cause of action relied on was the existence of danger, or that the threat of danger, or physical damage to persons or their property ... .

The House of Lords in *Murphy v Brentwood District Council* [1990] 2 All ER 908, the seven-man court described the decision as 'unsatisfactory'; 'not proceed(ing) on any basis of principle at all' and it was overruled along a number of dependent decisions. Other important decisions, notably *Junior Books v Veitchi* were 'confined to its facts'.

In *Caparo Industires Plc v Dickman & Ors*, Lord Oliver, after studying a line of authorities stated at pp 584–585:

> ... it is now clear from a series of decisions in this House that, at least so far as concerns the law of the United Kingdom, the duty of care in tort depends not solely on the existence of the essential ingredient of foreseeability of damage to the plaintiff but on its coincidence with a further ingredient to which has been attached the label 'proximity' and which was described by Lord Atkin in the course of his speech in *Donoghue v Stevenson* [1932] AC 562 at p 581) as —
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> > 'such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.'

Further, at p 585 Lord Oliver states:

> ... Thus the postulate of a simple duty to avoid harm, that is, with hindsight, reasonably capable of being foreseen, becomes untenable without the imposition of some intelligible limits to keep the law negligence within bound of common sense and practicality. Those limits have been found by the requirement of what has been called a 'relationship of proximity' between plaintiff and defendant and by the imposition of a further requirement that the attachment of liability for harm which has occurred be 'just and reasonable'.

The new approach is best summarized in their Lordships' most favoured passage, cited with such regularity that it must indicate the future lines of development:

> It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of prima facie duty of care restrained only by indefinable consideration which ought to negative, or to reduce, or limit the scope of the duty or the class of person to whom it is owed. (*Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at pp 43–44, per Brennan J.)

More precisely, in the instant case, this loss is alleged economic loss which includes the expenses incurred by the appellant in hiring of alternative transport while the vehicle was still in the workshop. It is a financial or pecuniary loss and does not involve any physical damage or the danger of physical damage to the property of the appellant. It is a case concerning pure economic loss. It is quite distinct from cases of economic loss involving physical damage.

If the respondents had, instead, physically damaged the appellant's car, then any financial loss suffered by the appellant flowing from the physical damage may be claimed against the respondents. Because the loss in this case is purely economic, being unable to rely on physical damage, the established legal position in regard to this is to preclude such claims even where foreseeable. '... the courts have always been reluctant to extend the law of negligence to claims of foreseeable economic loss;' 34 *Halsbury's Laws of England* (4th Ed) para 6 at p 9.

As we have seen, in *Muirhead v Industrial Tank Specialities Ltd* and *D & F Estates Ltd v Church Commissioners for England*, a Court of Appeal case and a House of Lords case respectively, which are the two of the many cases that have expressed their approval as to the position of the law put forward by Lord Brandon.

> ... the commonest reason given for excluding such (economic loss) claims from the ambit of the duty of care is the possibility of indeterminate liability. See *Textbook on Tort*, Michael A Jones at p 91.

In a Court of Appeal case of *Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundations Ltd & Ors*, Lord Purchas states (at p 97):

> ... if one is to extend the concept of the *Donoghue v Stevenson* duty beyond the occurrence of, or the danger of, physical damage then it should only be done as a matter of policy in special cases, ...

Learned counsel, Mr Noel, urged the court to extend the public policy to such a case as this in order to do justice to the common man on the Kuching omnibus. He said that there are numerous cases in the country, where the insurance company gets away with impunity on the ground of contractual promises. With respect, in my judgment, there must be a limitation on the extent to which a court will enforce contractual promises. Despite the freedom of contract there is still a residuary power to strike down contract as contrary to public policy. What is public policy? His Lordship, Borough J in *Richardson v Mellish* (1824) 2 Bing 229 said:

> ... public policy is a very unruly horse, and when once you get astride it you never know where it will carry you ... .

'I disagree,' said Lord Denning MR in *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591. 'With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice'.

It has been said since 1937 in *Fender v St John-Mildmay* [1938] AC 1 that 'the heads' of a public policy are closed. Parliament is a better forum in which to determine public policy since its members are democratically elected. But it is likely that judicial activism is not dead. Nevertheless, I would not venture to open 'the heads' of public policy, as in this case, which seems to me to be a frolic outside the domain of this court.

Learned counsel, Mr Roland Thomas, urged the court to consider the floodgates argument often explained by the current established cases as an important reason to restrict pure economic loss claims where it may be strictly logical to allow a claim. As Purchas LJ in *Greater Nottingham*'s case puts it (at p 95):

> ... there is no precedent for the application of strict logic in treading the path leading from the basic principle established in *Donoghue v Stevenson* [1932] AC 562 towards the Pandora's Box of unbridled damages at the end of the path of foreseeability. That this is a field in which the law has properly applied policy restrictions is justified by a glance at the position reached on the other side of the Atlantic where damages awarded in respect of medical and surgical negligence is, it is believed, affecting the proper execution and others of their professional tasks to the detriment of their patients.

To institute the right of action for negligence, three elements must be proved:

(a) there is a duty on the part of the defendant towards the plaintiff;

(b) the defendant negligently performs or omits to perform its duty; and

(c) the negligence is the effective cause of injury or damage to the plaintiff.

The onus of proving that the result of negligence is the effective cause of injury is upon the plaintiff. See *Ruoff v Long & Co* [1916] 1 KB 148 at p 152 and *Hussaina Rani i/k Naina Mohamed (suing as widow of Naina Mohamed, deceased) v Ahmad Nadzri Kamarudin & Anor* [1997] 2 MLJ 534 (CA). The defendant is responsible for the consequences which he could foresee or reasonably be expected to foresee as the natural result of his negligent act or omission. See *The Wagon Mound* [1961] AC 388 and *The Wagon Mound (No 2)* [1967] 1 AC 617.

Mr Thomas submitted that the relationship between the appellant and the first respondent is by way of an insurance policy (exh D26). The appellant is the insured owner of the vehicle and the first respondent is the insurer. The obligations or duties of the insurer are contractual, that is to indemnify the insured against loss or damage to the appellant's vehicle, and should exclude further tortious claim. The appellant has not shown or adduced evidence to show that their duties extend beyond the insurance policy. The respondent's duty is to indemnify the appellant as per insurance policy.

DW2 and DW4, officers of the first respondent, in their testimonies explained that the workshop where the appellant sent its vehicle for repairs, had a business arrangement with the first respondent, giving the workshop the privilege of repairing insured cars or vehicles without the need for an approval letter or authorization from the first respondent.

On the facts, the appellant's vehicle was brought to the workshop on 12 March 1993, and the respondent received the Motor Accident Report Form (exh D1) on 18 March 1993.

The first respondent had sent on the same date its in-house adjuster surveyor, DW1, to process the claim. However, the workshop tendered its quotation (exh D2) for the replacement of a whole gearbox assembly without giving the breakdown of items. The breakdown figure is necessary to enable the adjusters to adjust the claim. A fresh quotation (exh D3) was sent to the second respondent a month later, ie 26 April 1993.

The adjuster's report (exh D12) was prepared by DWI and was sent to the first respondent via Inter-Office Memorandum dated 4 May 1993 (exh D12). It is clear that the adjuster could prepare and submit his report after the workshop had submitted sufficient details on the damage.

DW1, DW2 and DW4 in their evidence confirmed that repairs to any insured vehicles referred by the respondent to the workshop can be done as quickly as possible, as soon as the in-house adjuster has seen the vehicle. This is to facilitate a quick repair to be done without undue delay. As a matter of fact, in this case, the repairs to the appellant's vehicle were carried out even before the formal approval was received by the workshop.

PW4 testified that the possibility of replacing only the damaged parts would take a long time as the parts were not available at hand and had to be ordered from Japan. The workshop took more than one month to prepare the details of the breakdown parts to be replaced. DW4 said that the in-house adjuster needed a cogent reason to allow the gearbox assembly to be replaced because it was rare that a gearbox assembly was damaged.

It is clear that the appellant was unable or failed to prove that the respondents have a duty toward the appellant in this matter. It has also failed to prove that the respondents had neglected or omitted to carry out their duties.

The appellant has failed to adduce evidence to prove damage suffered by it as a result of the negligent act or omission of the respondents.

Further, Mr Thomas submitted that the appellant's claim for loss of business, goodwill and opportunity to visit business clients must fail for two reasons. Firstly, the said vehicle was insured only for private use and not for business and commercial use. The manager of the appellant used the said vehicle to do business and to transport products or gold to the appellant's clients. The insurance (exh D 5) clearly states that the policy does not cover the carriage of goods. Therefore, the policy is voidable for non-disclosure of the purpose of the insured vehicle.

Secondly, the appellant cannot be heard to say that there had been loss of business or being inconvenienced by not having the said vehicle. There was alternative transport, eg the taxis, which the appellant had used to carry on its business.

Another matter that needs to be mentioned here is that it is not correct to bring a claim against the second respondent as he is not a party to the cause of action. As the action is grounded on negligence, the second respondent cannot be said as a tortfeasor in the action. He is a branch manager of the first respondent, and there is no evidence to show that he who gives approval or authorization to repair the car on behalf of the first respondent, and therefore that his action or omission caused the delay in the repair of the vehicle. He cannot be vicariously liable.

Moreover, the action is against the company — the first respondent — and the appellant is alleging that the company committed a tort of negligence against it. The company can be sued only in its own name, and not through its employee bearing in mind that he is not a tortfeasor. The company is a separate legal entity from its employees: *Salomon v Salomon & Co Ltd* [1897] AC 22.

On the totality of evidence and in the circumstances of the case, the appellant has failed to prove its case, and I would dismiss the appeal with costs.

Appeal dismissed.

Reported by Jafisah Jaafar